UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0549

September Term, 2014

ANTHONY PRESTON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Meredith,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: April 29, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Anthony Preston appeals from the Order of the Circuit Court for Baltimore County denying his petition for coram nobis relief. He presents one question for our review :

> Did the circuit court err in denying the petition for writ of error coram nobis on the ground that, as a matter of law, an increase in the federal sentencing guidelines as a result of a prior conviction is not a significant collateral consequence?

Finding that the circuit court did err, we shall reverse.

I.

On March 27, 2006, appellant pled guilty in the Circuit Court for Baltimore County to the offense of attempted armed robbery. The court sentenced him to a term of incarceration of six years, all but four years and six months suspended, with two years of probation. Appellant did not file an application for leave to appeal his sentence. He completed probation, unsatisfactorily, on June 29, 2009.

The United States Government filed criminal charges against appellant for acts that allegedly took place from 2010 through 2013.[1] He was charged in the United States District Court for the District of Maryland in a three-count Criminal Indictment with the offenses of, *inter alia*, conspiracy to participate in a racketeering enterprise and narcotics conspiracy. On June 12, 2013, the United States Probation Office issued a pre-plea investigation report outlining appellant's criminal history. The report indicated that appellant's 2006 Maryland

[1]The record does not indicate the factual circumstances surrounding appellant's federal offenses.

conviction for attempted armed robbery added three points to his criminal history computation in addition to the two points he received for an unrelated felony conviction. The two prior felonies rendered appellant a "career criminal" with a criminal history category of "VI." The report noted, however, that the findings were "preliminary" and "subject to revision in the Presentence Investigation Report."[2]

On August, 22, 2013, appellant filed in Maryland a petition for writ of error coram nobis, alleging that he was denied his right to effective assistance of counsel. He asserted that his trial counsel failed to advise him properly of the elements of the crime to which he pled guilty and the potential immigration consequences of his plea.[3] He argued also that the record did not demonstrate whether he was under the influence of any alcohol, drugs or prescription medications at the time that he entered his plea. Because of his counsel's alleged deficient performance, appellant contended that the guilty plea he had entered on March 27, 2006, was not knowing and voluntary. He alleged that the "one significant collateral consequence" he suffered as a result of his 2006 conviction was that, in a currently pending federal criminal case against him, his attempted armed robbery conviction would "affect his criminal history computation and his sentencing guidelines." Appellant contended

[2]The record does not indicate whether appellant was convicted of the federal offenses, or, if convicted, whether the federal district court imposed an enhanced sentenced as a result of appellant's 2006 Maryland conviction.

[3]Appellant failed to allege that he was not a United States citizen or that his guilty plea would have any immigration consequences.

that because of his prior convictions, including his 2006 Maryland conviction, his federal sentence "could almost double" under the federal sentencing guidelines.

On February 10, 2014, the trial court denied appellant's petition for coram nobis relief without a hearing. The court found that appellant was not facing a significant collateral consequence as a result of the challenged state conviction. The court ruled, in pertinent part, as follows:

> "The [appellant] essentially alleges that the advisory sentencing guidelines that will be calculated for his new offense will be higher as a result of this prior conviction. *This is simply not a significant collateral consequence.* Realistically, sentencing guideline calculations, both in federal and state court, are routinely impacted by the fact of a prior conviction. Were this deemed to be a 'significant collateral consequence,' the extraordinary relief contemplated through a writ of error coram nobis would potentially be available to nearly any defendant facing a subsequent conviction." (Emphasis added).

After the trial court denied appellant's motion for reconsideration, this timely appeal followed.[4] The case was briefed by both parties and submitted for decision on the briefs, with no oral argument. Because on July 18, 2014, the Court of Appeals granted a petition for writ of certiorari in the matter of *State v. Smith*, 443 Md. 572 (2015), wherein the issue presented to the Court was whether Maryland Code § 8-401 of the Criminal Procedure

[4]The sole basis for appellant's motion for reconsideration was that the trial court issued its order before receiving appellant's response to the State's answer to appellant's petition for coram nobis relief. The court reviewed the motion and denied it on the same grounds as its previously issued order.

Article applies retroactively to present waiver of the right to seek coram nobis relief where the petitioner has failed to file an application for leave to appeal, the same issue presented in the instant case, this Court issued a stay pending a decision in that case. The Order of this Court also mandated that the parties notify this Court of the Court of Appeals decision when it is issued. Apparently, the Court of Appeals filed its opinion in *State v. Smith*, 443 Md. 572, on July 15, 2015. Neither appellant nor the State notified the Court of Special Appeals of this opinion. Hence, our delay in addressing this case.

II.

Before this Court, appellant claims that the trial court erred by denying his petition for coram nobis relief. First, he asserts that he has not waived his right to seek coram nobis relief even though he failed to file an application for leave to appeal his conviction. Appellant maintains that the failure to seek an appeal cannot be construed as waiver of his right to file a petition for writ of error coram nobis. Next, he contends that the trial court found improperly that he failed to allege a significant collateral consequence. Appellant argues that the adverse consequence requirement is "not a high bar" and that an increase in federal sentencing guidelines satisfies the burden to seek coram nobis relief.

The State contends that the trial court denied appellant's petition for coram nobis relief properly, maintaining that appellant waived his right to coram nobis relief because of his failure to file an application to appeal his 2006 conviction. Even if preserved, the State

argues that appellant's petition fails because he did not meet his burden of establishing a sufficient adverse consequence. In the State's view, because the federal sentencing guidelines are advisory, the potential for an enhanced federal sentence cannot constitute a significant collateral consequence of the state conviction.

III.

A writ of error coram nobis is a common law action, a civil matter procedurally independent of the underlying action from which it arises. *Ruby v. State*, 361 Md. 100, 107, 111 (1999). Originally, the scope and purpose of the writ was limited to correct an error in fact, in the same court where the record lies. *Hawkins v. Bowie*, 9 Gill & J. 428, 437 (1838). The scope and purpose of the writ was broadened in *Skok v. State*, 361 Md. 52, 75 (2000), where Judge John C. Eldridge, writing for the Court of Appeals, made clear that the writ is available to raise issues beyond facts unknown to the trial judge. He explained as follows:

> "Consequently, as a result of *United States v. Morgan*, [346 U.S. 502 (1954)] in both federal and state courts, the scope of a coram nobis proceeding has been broadened. As set forth by Professor Wright (3 Wright, *Federal Practice and Procedure Criminal* 2d, § 592, at 429-432 (1982), footnotes omitted), '[t]he present-day scope of coram nobis is broad enough to encompass not only errors of fact that affect the validity or regularity of legal proceedings, but also legal errors of a constitutional or fundamental proportion. The conviction is presumed to have been the result of proper proceedings, and the burden is on the defendant to show otherwise. In *Morgan* the Court said broadly that 'in behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief,' but it

> also said that courts should use 'this extraordinary remedy only under circumstances compelling such action to achieve justice.'"

Id.

To state a cause of action for coram nobis relief, the petitioner must allege: (1) that the grounds for challenging the criminal conviction are of a constitutional, jurisdictional or fundamental character; (2) that he or she is suffering or facing significant collateral consequences from the conviction; (3) that the claim is not waived or finally litigated; and (4) that the petitioner is not, as a result of the underlying conviction, incarcerated or subject to parole or probation. *Smith v. State*, 219 Md. App. 289, 292 (2014); *see also Graves v. State*, 215 Md. App. 339 (2013). The remedy remains an extraordinary one, which should be used only in compelling circumstances. *Id.* at 72.

A. The Waiver Issue

On July 15, 2015, the Court of Appeals filed *State v. Smith*, 443 Md. 572. The Court held that even though Smith did not file an application for leave to appeal her conviction, move to withdraw her guilty plea, or file a post-conviction relief petition, she did not waive her right to pursue coram nobis relief. *Id.* at 587-610. The Court held that § 8-401 applies retrospectively. Section 8-401 of the Criminal Procedure Article is a statute governing procedure or remedy, and hence applicable to cases pending in the court when the statute became effective. *Id.* at 587-95. Section 8-401 went into effect on October 1, 2012—before

appellant filed his petition for coram nobis relief, but after his 2006 conviction for attempted armed robbery. Accordingly, we hold that pursuant to § 8-401, appellant's failure to file an application for leave to appeal his 2006 conviction did not constitute a waiver of his right to petition for coram nobis relief.

B. The Merits

Finding that appellant has not waived his right to seek coram nobis relief, we consider next whether appellant met his burden of stating a significant collateral consequence as a result of his state conviction. Appellant raised an enhanced federal sentence as a result of his underlying conviction to satisfy the significant adverse consequences requirement for coram nobis relief. The trial court held that this was not sufficient as a matter of law, stating "*[t]his is simply not a significant collateral consequence*." We hold that facing an increased federal sentence as a result of a state conviction may be sufficient allegation to state a cause of action for coram nobis relief, and the trial court ruled incorrectly in dismissing appellant's petition based on not satisfying the significant adverse consequences requirement.

In *Parker v. State*, 160 Md. App. 672 (2005), we considered the legal effect of alleging in a coram nobis petition the prospect of receiving an enhanced federal sentence as a result of a state court conviction. Parker filed petitions for coram nobis seeking to vacate several state court convictions. He alleged that he was scheduled to be tried in federal court on a federal gun charge and that, under federal sentencing guidelines, he would face an

increase of up to 28 months in his sentence of incarceration as a result of his state court convictions. *Id*. at 676. His sole ground for relief was that his guilty pleas were not knowing and voluntary. *Id*. The trial court entered orders denying Parker's petitions without explanation. *Id*.

On appeal, Parker argued that the trial court erred by failing to consider his petitions for coram nobis relief. As to his allegation that he could face an enhanced federal sentence as a result of his state convictions, we held that Parker's allegation was sufficient to "satisfy the significant adverse consequences requirement and thus, along with other allegations," the petitions *stated a cause of action*. *Id*. This Court did not conclude that, as a matter of law, Parker was facing or suffering a significant collateral consequence. *Id*. at 688-89. In fact, we raised some issues against such a finding on remand, namely that, after he filed his petitions, Parker had been convicted in federal court and sentenced to a term of incarceration of less than the statutory maximum and less than the amount Parker alleged that he would have faced if his challenged state convictions did not count towards sentencing. *Id*. at 688. We "simply recognize[d] that appellant's petitions stated a cause of action for coram nobis relief" and that the "ultimate conclusion will likely turn on whether the significant collateral consequences requirement was met in light of [Parker's] conviction and sentence in federal court." *Id*. at 688-89. Because the petitions stated a cause of action, we vacated the orders of dismissal and remanded the case for the trial court to decide whether Parker was entitled to coram nobis relief. *Id*. at 688.

In the case *sub judice*, the trial court ruled incorrectly that appellant did not state a significant collateral consequence as a result of his state conviction. Appellant's allegation that he could face an enhanced federal sentence was sufficient *to state a cause of action*. Remand is appropriate because appellant's petition states a cause of action and the question of whether appellant's circumstances meet the adverse consequences requirement and warrant coram nobis relief is to be resolved by the trial court, and appellant is due the opportunity to make such a showing.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED AND REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY BALTIMORE COUNTY.